Nos. 14-3528 & 14-3729

In the United States Court of Appeals for the Seventh Circuit

CATERPILLAR INC.,
PETITIONER/CROSS-RESPONDENT,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS UNION, AFL-CIO/CLC,
INTERVENING RESPONDENT.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, CASE NO. 30-CA-064314

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT CATERPILLAR INC.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos.: 14-3528 & 14-3729

Short Caption: **Caterpillar Inc. v. National Labor Relations Board**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Caterpillar Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

WINSTON & STRAWN LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

N/A

(ii) List any publicly held company that own 10% or more of the party's or amicus' stock:

No publicly held company owns 10% or more of Caterpillar's stock.

Attorney's Signature: /s/ Joseph J. Torres Date: July 6, 2015

Attorney's Printed Name: **Joseph J. Torres**

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INTRODUCTION

The Board erroneously applied a "liberal discovery-type [information request] standard" (A007) to this case. But this case does not involve an information request; it involves a request for property access, which the Board in *Holyoke Water Power Co.* "disagree[d]" was "tantamount to a request for information." 273 NLRB 1369, 1370 (1985). The Board of course knows this; so in an attempt to defend its faulty reasoning it has invented a new type of case—a "hybrid information-request/access case"—which it says maintains the "doctrinal niche" created for information cases. NLRB Br. 18.

But the Board rejected this conflation of standards in *Holyoke*: "[W]e disagree with the [ALJ's] analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant . . . we disagree that that alone, *ipso facto*, obligates an employer to open its doors." *Holyoke*, 273 NLRB at 1370. Yet this is exactly how the Board reasoned here: "[T]here can be no adequate substitute for the Union representative's direct observation of . . . safety concerns." A007 (citations omitted). For this reason alone, the Court should deny enforcement.

As *Holyoke* makes plain, in cases involving property access, "an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access." *Id.* at 1370. And this consideration is sufficiently weighty that "where . . . a union can effectively represent employees through some alternate means other than by entering on the employer's property, the employer's property rights will predominate, and the union may properly be denied access." *Id.* Far from being automatic, access is a last resort.

The Board and the Union also insist the Board did not presume access was required. Instead, they say the Board weighed the parties' competing interests. But the Board began its analysis by declaring "there can be no adequate for the Union['s access]" (A007), after which the result of the "balancing" was a *fait accompli*. For the Board and the Union now to say the Board balanced the parties' interests does not make it so. The Board's and Union's arguments on appeal constitute nothing more than a recitation of the same faulty analysis applied in the Board's decision.

Attempting to escape this conclusion, the Board says it is Caterpillar's burden to show the Union's representational interests can be achieved by alternatives other than access. NLRB Br. 24, citing *Nestle Purina Petcare*, 347 NLRB 891, 891 (2006). That is true, but irrelevant here, as the Board never gave proper consideration to the alternatives Caterpillar identified, given the mistaken legal presumption it applied.

In fact, Caterpillar easily carried its burden. In response, the Board and the Union claim the Board correctly rejected these alternatives on the basis of USW international representative Sharon Thompson's "persuasive" testimony that they were insufficient and that her visit would not have interfered with production. Leaving aside any debate about the "persuasiveness" of Thompson's criticisms, the fundamental problem with the Board's position is that Thompson's testimony at trial was the first time the Union offered any substantive response to Caterpillar's proffered alternatives to access. At the time Caterpillar offered alternatives—video-recorded reenactments, standard work protocols, post-accident investigation reports, offers to meet and discuss processes, and on and on—the Union refused to engage in any meaningful discussion and stood on its demand for access. Thompson's post-hoc rationalizations of the Union's

intransigence or criticisms of the Company's alternatives do not satisfy the Board's balancing test for evaluating the need for access at the time access is requested.

The Board also argues Caterpillar's property interest was lessened by its history of allowing access by other nonemployee groups, and that Caterpillar failed to prove its then-asserted confidentiality interests outweighed the Union's representational needs. However, the Board's holding on this point fails to recognize the actual breadth of Caterpillar's property rights, and is inconsistent with Supreme Court and Board authority regarding such rights.

Caterpillar also demonstrated in its opening brief that the Board's order is moot. The Board appears to agree, insisting that "[t]he case is not moot *as the Board requires enforcement of its Order that mandates not just access for the Union to investigate the 2011 accident*, but a health and safety inspection to ensure that the Company's crawler assembly production areas are free of hazards today." Board Br. 15 (emphasis added). The Court should refuse enforcement, at least insofar as the Board awarded retrospective relief.

Nor is it any answer to say that Caterpillar cannot be "certain" an accident will "never" happen again at the plant that (purportedly) requires the immediate attention of the Union's safety specialist. As the Supreme Court recently reiterated, quoting this Court, "one can never be certain that findings made in . . . one lawsuit will not some day . . . control the outcome of another suit. [I]f that were enough to avoid mootness, no case would ever be moot." *Camreta v. Greene*, 131 S. Ct. 2020, 2034 (2011) (quoting *CFTC v. Bd. of Trade of Chicago*, 701 F.2d 653, 656 (7th Cir. 1983)). Here, the Board's order is focused on investigating a particular accident. But neither the Board nor the Union can explain how that can be done. They point to the possibility of future accidents, yet cannot explain why it is reasonable to expect another accident at this facility. For this reason, too, the Board's order should be denied enforcement.

ARGUMENT

I. The Board and Union misstate *Holyoke*'s standard for access and misread the Board's analysis below, which renders *Holyoke*'s balancing test an empty vessel.

Where the Board establishes a specific test for evaluating a union's right to access, its order may be enforced only when it actually applies that test. Here, the Board erroneously applied an information request standard and presumed access was necessary. Because the Board failed to apply its balancing test, enforcement of its order must be denied.

A. This is not an information request case, and the Board's standard for information request cases is not applicable here.

Although paying lip service to *Holyoke*'s balancing test, the Board continues to treat the Union's demand for access as a mere information request. According to the Board, the "applicable principles" here treat union information requests concerning health and safety matters as "presumptively relevant." NLRB Br. 17. From there, the Board asserts *Holyoke* created an analysis for "hybrid information-request/access cases" that maintained the "doctrinal niche" established in cases involving information requests. *Id.* at 18.

But there is no "hybrid" "information-access" standard. To the contrary, it was precisely such a conflated standard that the Board rejected in *Holyoke*. There, the ALJ, relying on *Winona Industries*, 257 NLRB 695 (1981), thought that a union's request for access to survey for safety hazards was akin to a request for information. And because the "information requested" (*i.e.*, access) related to terms of employment, the ALJ deemed it presumptively relevant. On review, the Board squarely rejected this reasoning:

> [W]e disagree . . . that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors.

Holyoke, 273 NLRB at 1370. To the extent that cases like *Winona* treated access like information, *Holyoke* expressly overruled them. *Id.*

The Board recognized this distinction more recently in *Northwoods Rehab.*, 344 NLRB 1040 (2005), where the employer refused to provide information *and* access. As to the information request, the Board held "when a union makes a request for relevant information, the employer has a duty to supply [it] . . . or to adequately explain why it was not furnished." *Id.* at 1044. Turning to the access allegation, the Board applied the separate balancing test prescribed in *Holyoke*. *Id.* at 1045; *see also Nestle Purina Petcare*, 347 NLRB 891, 893 (2006) (same). The latter is the approach the Board should have taken here. Having rejected the information request standard as applicable to access cases, the Board may not seek enforcement of an order that applied the very test its precedent rejects. *See Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 760 (7th Cir. 1982) (denying enforcement because Board failed to adhere to its own precedent); *Midwest Stock Exch. v. NLRB*, 620 F.2d 629, 633 (7th Cir. 1980) (same); *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369-70 (D.C. Cir. 1995) (same).

The Board and the Union additionally argue the information request standard is relevant to the Board's application of the *Holyoke* test because it initially had to determine whether the requested information was "necessary to the Union's duties as a bargaining representative." NLRB Br. 23; Union Br. 24. While the Board did have to make that determination, *Holyoke* does not permit the Board to also use that lower threshold in evaluating whether Caterpillar's property rights were required to yield to the Union's request for access. Because the Board failed to properly apply the *Holyoke* standard, its order may not be enforced. *Consol. Papers*, 670 F.2d at 760.

B. The Board erred by presuming that no alternatives to access can ever suffice, thereby rendering Holyoke's balancing test a nullity.

The Board additionally erred by proceeding from the presumption that "there can be no adequate substitute" for access. A008. *Holyoke* places no such analytical thumb on the scale, but rather provides if "a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate . . . ." 273 NLRB at 1370. By proceeding from the premise that access is always an imperative for which no alternatives exist, the Board rendered *Holyoke*'s balancing test a nullity.

The Board is certainly free to revisit its legal standards, "provided it gives a reasoned analysis in support" of any changes. *Kmart Corp. v. NLRB*, 174 F.3d 834, 842 (7th Cir. 1999) However, it may not do so *sub silentio*. Where it departs without explanation from its established precedent, its order may not be enforced. *Consol. Papers*, 670 F.2d at 760.

In its brief, the Board maintains it did not presume access was always required, as Caterpillar contends, but rather that it determined Caterpillar failed to show alternatives existed: (1) the Company's property interest was lessened by previously allowing access by other nonemployee groups; (2) the Company failed to prove its then-asserted confidentiality interests outweighed the Union's representational needs; (3) Thompson "persuasively" and "credibly" testified that Caterpillar's alternatives were insufficient. NLRB Br. 24-27.

All of these reasons are meritless. The Board's second and third reasons are addressed *infra* at Argument I.B. Regarding the first point, the Board's determination that the Company's property interests were somehow lessened by the fact that it had previously given plant tours to other nonemployee groups is not supported by the evidence and is legally incorrect. The record shows that since Caterpillar acquired the facility, the occasions on which third-parties have been

granted access to the site have been extremely limited, involving only select customers or student groups. A138-40.

And regardless of these facts, Board law holds that an employer's property rights are *not* diminished previous instances of third-party access. *See Register-Guard*, 351 NLRB 1110, 1117-18 (2007), rev'd on other grounds, *Purple Commc'ns.*, 361 NLRB No. 126 (Dec. 11, 2014). Such a degradation of property rights only occurs where the employer discriminates against Section 7 activity, meaning it gives "unequal treatment [to] equals." *Id.* at 1117 (citing, *Fleming Co. v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995)). No such evidence exists in this case, so it was erroneous for the Board to rely upon that purported fact to justify access. *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 723 (7th Cir. 2000) (denying enforcement to Board order where factual findings not supported by record); *NLRB v. Local 705, Int'l Broth. of Teamsters*, 630 F.2d 505, 508 (7th Cir. 1980) (same).

Ignoring its more recent *Register-Guard* precedent, the Board cites *Hercules, Inc.*, 281 NLRB 961 (1986), *enf'd*, 833 F.2d 426 (2d Cir. 1987), in support of its argument that it "reasonably concluded, applying longstanding precedent, that the Company's practice in permitting such third-party access diminished its interested in excluding the Union's [access request]." NLRB Br. 25-26. But following *Register-Guard*, the Board could not rely upon such third party access to find Caterpillar's property rights were diminished. Because the Board failed to apply its governing precedent, its order may not be enforced. *Consol. Papers*, 670 F.2d at 760.

The Board's failure to give adequate weight to Caterpillar's property rights also runs counter to Supreme Court jurisprudence. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992)

and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the Court held that an employer's property interests allow it to exclude nonemployee union agents from its premises except where such access is absolutely necessary to fulfill the employees' Section 7 rights to self-organization.

The Board argues these authorities are limited to cases in which a union is seeking to organize employees in the first instance. NLRB Br. 34. There is a distinction, the Board urges, when an incumbent union seeks access to an employer's property in exercising its statutory duties, as compared with union organizers. *Id.*

However, this curious theory finds no basis in the language of the Act, which puts employees' rights to self-organization and collective bargaining on equal footing in Section 7. 29 U.S.C. § 157. Nor is there support for the Board's position in its own precedent. *Lechmere* and its progeny have not been limited to situations involving organizing, but rather have been applied by the Board in numerous settings. In its brief, the Board maintains "most" of these situations involve "representational access." NLRB Br. 35. But, the Board concedes they do not all involve organizing, and it has no meaningful basis for distinguishing a case like *Success Village Apartments*, 347 NLRB 1065, 1077 (2006), where the Board recognized *Lechmere*'s principles in evaluating a union's claim for access to hold grievance meetings with employees. More fundamentally, *Holyoke* itself—the decision that controls the instant case—expressly relies on *Lechmere*'s predecessor, *Babcock & Wilcox*, 351 U.S. 105.[1]

[1] Citing the First Circuit's decision in *Holyoke Water Power Co.*, 778 F.3d 49 (1st Cir. 1985), the Union claims *Babcock & Wilcox* and *Lechmere* do not govern *Holyoke* cases. Union Br. at 22 (citations omitted). However, following the First Circuit's decision, the Board has continued to cite those Supreme Court cases as underpinning *Holyoke*. *See Brown Shoe Co.*, 312 NLRB 285, 285, n.3 (1993).

Holyoke could not be more clear on this point. In evaluating a union's demand for access, the paramount consideration is whether and to what extent the union possesses alternatives to access that would enable it to meet its representational function. Where such alternatives exist, the inquiry is over. Access is properly denied. *Holyoke*, 273 NLRB at 1370.

Despite this precedent, the Board erroneously reduced Caterpillar's property rights to the Company's "confidentiality interest."[2] SA001, n.2. But the Company's property rights are more substantial than that one consideration, even if it "frequently gives tours to customers, dealers, technical groups, and . . . students." *Id.*; *see* Caterpillar Br. at 26-28, 30-31. Caterpillar did not deny access based only on a concern for confidentiality. A137, A185-87. Thus, even if it could be said the Board conducted a balancing test, it did so erroneously, with a thumb on the scale in favor of access.

Therefore, contrary to the Board's and Union's arguments, it was legal error for the Board to frame its analysis in terms of the "liberal discovery-type standard" applicable to information requests, and to evaluate the Union's demand for access through a lens that presumed "there can be no adequate substitute" for access. A008. Because the Board failed to apply its governing precedent, its order may not be enforced. *Consol. Papers*, 670 F.2d at 760.

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[2] According to the Board and the Union, Caterpillar has "abandoned" its arguments regarding "confidentiality concerns as a basis to deny access to the Union." NLRB Br. at 25, n.3; Union Br. at 9-10, n.2. This is a red herring. Caterpillar's argument, to the Board below and this Court, is that its property rights are much more substantial in scope and, under current Supreme Court and Board precedent, entitled to much greater weight than the narrow "confidentially concerns" the Board erroneously focused on in holding that the Union's "right to access . . . outweighed Caterpillar's property interests." *See* Caterpillar Br. at 26-30.

C. Caterpillar met its burden under *Holyoke* of establishing alternatives to access that would have allowed the Union to discharge its representational function.

Having set an impermissibly low burden to evaluate the Union's demand for access, the Board found the Union's health and safety expert "persuasively demonstrated that the accident investigation materials that Caterpillar previously submitted to the Union were deficient and an onsite survey remained necessary." A008. This conclusion, however, was also in error because it was entirely based on *post hoc* explanations. Just as the Board may not seek enforcement of its orders by offering this Court *post hoc* explanations, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"), it may not find its balancing test is satisfied based on after-the-fact explanations never presented to the Company at the time that balancing was to have occurred.

1. Caterpillar provided and offered an abundance of alternatives to access that would have allowed the Union to represent its members vis-à-vis the accident.

The Board and the Union argue Caterpillar is misstating the applicable burdens required by *Holyoke*. It is the employer's burden, they argue, to show that alternatives to access existed that would have allowed the union to satisfy its representational interests. *See* NLRB Br. 24, 28-29; Union Br. 23-24. These arguments misstate the Company's position and, in any event, are beside the point.

Caterpillar agrees the employer bears the burden of showing that alternatives to access existed. *See, e.g.*, *Nestle Purina*, 347 NLRB at 891. The Company does not seek to shirk this burden. That is why the Company presented overwhelming evidence of alternatives that would have allowed the Union and its chosen safety representative to investigate the 2011 accident at the Milwaukee facility:

- Access to the site by Local Union officials, both immediately following the accident and at all times thereafter, A030-34, A058-59, A068-73, A130;[3]

- Multiple DVD recordings of a reenactment of the part-turning procedure at issue, A047-48, A219-20, A271, Joint Exs. 1, 2;

- Written explanations of various aspects of the part-turning operation, A213-15;

- Detailed standard work protocols of the new work procedures, A051, A253-55, A272-88;

- A copy of the investigatory file compiled by law enforcement officers and continued participation in all aspects of OSHA's investigation, A219-20, A223-43, A272-88.

The Company also offered to videotape the new procedure as it was performed and to facilitate a conversation between Company and Union safety representatives to discuss questions. A141, A244. It also made a similar open-ended offer to engage in any further dialogue the Union might want to have concerning the accident or the work procedures involved. A187.

Thus, this case is critically distinguishable from prior circumstances in which the Board held that an employer failed to meet its burden under *Holyoke* of showing alternatives to access. In *Nestle Purina*, for instance, the union demanded access to conduct a time and motion study of warehouse forklift drivers, which was necessary for the union to investigate complaints that recent process changes were causing drivers to work excessive hours. 347 NLRB at 893. The employer refused access, contending the union could effectively represent the drivers by

[3] The Union accuses Caterpillar of "exaggerating" the extent to which Local Union officials were involved in the post-accident investigation. Union Br. at 27-28. Caterpillar's assertions are in fact well-supported by the record. Caterpillar Br. at 4-6. Moreover, this evidence does not support the Union's claim that Caterpillar sought to determine which Union officials it will deal with. Nor does it support the argument that the Union could only rely upon the Company's opinion regarding the adequacy of the prior investigation. As such, the Union's citation to *Hercules*, 281 NLRB 961, is inapposite.

requesting information on the drivers' pace of work, output and production, disciplinary records, forklift speed, and safety records. *Id.* But, the Board rejected the employer's position because it "ha[d] not shown that it actually has any data regarding the forklift drivers' pace of work." *Id.* Similarly, the employer failed to demonstrate "how the other requested information it [said] the Union might request could be used to determine whether forklift drivers are working in excess of 100 percent efficiency." *Id.*

In contrast, Caterpillar made the very showing the Board found lacking in *Nestle Purina*. For one thing, the information Caterpillar produced and offered to the Union was the *only* available information concerning the accident. After the day of the accident, there was no additional information to be gleaned from on-site review of the scene, because the equipment had been moved, the area cleaned, and operations resumed.[4] A135-36. And, within a week of the accident, the manufacturing process had been materially changed (with input from bargaining unit operators). A144-45. Further, another of the Union's international safety representatives—not Thompson, who did nothing to investigate other than demand access—actually *did* conduct witness interviews and render conclusions concerning the accident's cause. A105-08, A110, A298-338.

In this regard, the facts here mirror those in *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), denying enf. to 312 NLRB 285 (1993). The employer in *Brown Shoe*, like the employer in *Nestle Purina*, also denied a union's request for access to perform a time study. However, unlike the employer in *Nestle Purina* (and instead like Caterpillar here), the employer

[4] The Union claims post-accident access would have been meaningful because Caterpillar is "still manufacturing crawler assemblies." Union Br. at 32. However, it is undisputed that the applicable procedure was changed shortly after the accident. A143-44, A155-56, A272-88. *Holyoke* only speaks of access to investigate a specific issue, not generalized access concerning future issues that might arise. *See also* discussion *infra* at Argument II.

in *Brown Shoe* established that it had actually provided the union with numerous pieces of information concerning employee earnings, items produced, wage rates attributable to production, and the like. Additionally, the Eighth Circuit deemed significant the fact that the union could have sought still additional information, including production-rate data, manufacturer information, and the like, that would have further obviated any need for access. *Id.* at 1023-24.

Given these facts, the Board's conclusion that the Union's need for access outweighed Caterpillar's interests falls short. According to the Board, the "Union critically needed to enter the facility, in order to directly observe the manufacturing area, where a fatality occurred." A008. But Union officials did have access to the area during and immediately after the accident, and the Union's health and safety expert had unfettered access to these individuals and their observations and knowledge of the area. A030-34, A058-59, A068-74, A129-31, A134-35, A146-47, A151. The Union's expert also had access to the employees who participated in the Company's re-design of the work protocols at issue. A152, A155-57, A289-95. Despite all of this, the Union's expert candidly admitted that once she was denied access, she conducted no further investigation at all. A091-93, A102-06.

The Board also surmised that "[a] conclusive finding on causation would have permitted the Union to enter into an intelligent dialogue with Caterpillar regarding ways to enhance workplace safety . . . ." A008. But even after another Union health and safety expert conducted an investigation and reached conclusions regarding causation, no such dialogue was sought. A110-11, A141, A244, A298-338.

Thus, the Board's and Union's arguments about which party bears the burden of showing alternatives is a red herring. The Company met its burden of showing numerous alternative

sources of information concerning the accident. The Board and the Union address some of this evidence in their briefs, declaring various elements, in isolation, as inadequate for one reason or another. NLRB Br. 27, 30-31; Union Br. 30-31. But, as discussed *infra*, such *post hoc* arguments cannot demonstrate that Caterpillar failed to meet its burden.

2. The Board erred by accepting the Union's post-hoc rationale for rejecting Caterpillar's proffered alternatives to access.

Just as there is no factual dispute about the myriad sources of information that Caterpillar provided and offered to the Union as alternatives to access, there is similarly no dispute about the Union's reaction. The Union's chief witness and proposed safety expert candidly admitted at trial that she did not consider any of the Company's alternatives at the time they were offered. A097-100, A141. Instead, the Union stood on its demand for access, rebuffed the Company's offers to discuss the matter, and maintained throughout that nothing would suffice but access itself. A141, A161, A188-91.

The Board and the Union argue here that Thompson testified "persuasively" as to the reasons why the Company's alternatives to access were insufficient, and the Board was justified in exercising its discretion to credit this testimony. NLRB Br. 24-27; Union Br. 32-33. However, the Board's and the Union's reliance on the "persuasiveness" or "credibility" of Thompson's testimony at trial is misplaced. Regardless what Thompson may have said at trial concerning the Company's offered alternatives to access, the fact remains that she and the Union said none of those things at the time that mattered—i.e., during the weeks and months following the Union's demand for access, when the Company was proposing alternatives.

On this factual record, the Board cannot be said to have properly applied its *Holyoke* balancing test. *Consol. Papers*, 670 F.2d at 760. And the Board's and Union's summary of that testimony to this Court does not correct the Board's error below.

Moreover, on the issue whether access was required, Thompson's testimony speaks for itself in terms of its "persuasiveness." Any reasonable review of her testimony on that point—quoted in substantial part in the Company's opening brief—leaves the reader lost as to the claimed need for on-site access beyond Thompson's expressed desire to "see, hear, and feel" everything.[5] A093-95.

It is not necessary, however, to pass judgment on the persuasiveness of Thompson's explanations at trial because it is undisputed that the first time she offered those explanations *was at trial*. That is, neither Thompson nor anyone else at the Union ever engaged the Company on the subject of alternatives to access at the time that access was demanded and alternatives were offered. Had such a conversation occurred at that time, the Company might have offered still other alternatives, or agreed that access was appropriate. All of which is speculation at this point, because the Union did not object to the Company's offered alternatives for any reason other than that they were not access. Thus, the Board cannot be said to have properly applied the required balancing test when there is no evidence the Union meaningfully engaged the Company on the question of possible alternatives *at the time access was requested.* Because there is no evidence supporting the Board's conclusion to the contrary, its order may not be enforced. *Empress Casino*, 204 F.3d at 723; *Local 705, Int'l Broth. of Teamsters*, 630 F.2d at 508.

Once Thompson's post-hoc criticisms and rationalizations are stripped away, the Board's determination that the Company failed to establish alternatives to access rests on nothing but the bare presumption that access will always be necessary, that no alternatives will ever suffice. But,

[5] Again, if demands for access can be predicated on the need to "see, hear, and feel" the facility, there will never be a case when an employer can offer satisfactory alternatives and *Holyoke*'s purported balancing test is a façade.

this is not the law. The Board's decision turns *Holyoke* on its head and, therefore, it must be reversed. *Consol. Papers*, 670 F.2d at 760.

D. *Holyoke* rightly overruled *Winona Industries*, and the Union offers no basis for applying the Board's annulled authority.

The Union also argues the Court should affirm the Board's decision below, but under the rejected information request standard set forth in *Winona Industries*, 257 NLRB 695 (1981). The Union's argument is misplaced, as even the Board acknowledges, because the decision under review did not apply or rely on *Winona Industries*. *See* NLRB Br. 18 n.2 (urging rejection of Union's argument because "it is well-established that 'an administrative order cannot be upheld unless the grounds upon which the agency acted . . . were those upon which its action can be sustained.'") (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)).

II. The Board and the Union assert a non-existent agency justiciability requirement, misstate the mootness standard, and misread the Board's order.

A. Caterpillar did not "waive" mootness, and could not have done so anyway.

The Board and the Union insist "Caterpillar has waived the argument [that this case is moot] because it failed to raise this contention before the Board." Union Br. 13 n.3; NLRB Br. 38 n.8. Not only are these very arguments waived because the Board and the Union placed them in footnotes, justiciability is not waivable because it goes to subject-matter jurisdiction. 13B Fed. Prac. & Proc. Juris. § 3533.1 n.2 (3d ed.).

Further, there are two deeper problems here. *First*, "[a]dministrative adjudications … are not an article III proceeding to which . . . the 'case or controversy' . . . requirements apply[.]" 13B Fed. Prac. & Proc. Juris. § 3531.13 n.46 (3d ed.) (quoting *Ecee, Inc. v. Federal Energy Regulatory Commission*, 645 F.2d 339, 349–350 (5th Cir. 1981)). Thus, the Board had no obligation to entertain a constitutional mootness argument. *Second*, Caterpillar did show that the dispute was moot by making the same showing it makes today: "Caterpillar has repeatedly

explained to the USW, after September 8, there was no possible benefit to be gained by Thompson . . . view[ing] the accident site, because [the accident site] ceased to exist . . . and operations resumed the following day." Caterpillar Exceptions Br. 38. This was our mootness argument articulated in terms appropriate for an Article II tribunal. Thus, even if Caterpillar could have waived the argument (it could not), it did not do so.

B. Mootness does not require "certainty" that an order could "never" have any impact; it requires a "reasonable likelihood" that the order will have an effect, which does not exist here.

The Board also insists that "[t]he employees cannot rest their safety on the Company's confidence that another accident will never occur." NLRB Br. 15. They add: "Four years of accident free work is no guarantee that an accident is impossible in the future. Indeed, the Company can with no more certainty assure this Court that all danger has passed than it would have been able to assure Smith . . . that he was working in a danger-free environment." NLRB Br. 46; *see also id*. at 37; Union Br. 14. "Never," "guarantee," "certainty," "no accidents . . . ever"—this is not the standard for mootness. Again, "one can never be certain that findings made in a decision concluding one lawsuit will not some day . . . control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot." *Camreta*, 131 S. Ct. at 2034 (quoting *CFTC*, 701 F.2d at 656). Rather, as the Supreme Court held in *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970), there must be a "reasonable" likelihood of a future effect; the record here reveals no such likelihood at the South Milwaukee facility.

Ignoring *Raytheon*'s holding, the Board and the Union attempt to analogize the situation here to *Raytheon*'s facts, in which "a union lost a representational election and . . . filed objections to the election and unfair labor practice charges." Union Br. 17. But elections do not happen by accident; nor are they events that (like accidents) the Union itself attempts to avoid. Just the opposite. As this Court emphasized in one of the Union's own cases, the union

"will doubtless continue its organizational efforts and may hereafter petition for another election"; "hence a decision as to its legality will not be a futile exercise of jurisdiction." *NLRB v. Marsh Supermarkets, Inc.*, 327 F.2d 109, 111 (7th Cir. 1963).

An accident, in contrast, is more like the firing of a single employee—the situation in *Milwaukee Police Association v. Board of Fire & Police Commissioners*, 708 F.3d 921 (7th Cir. 2013), a case the Board and Union fail to distinguish. There, after the discharged employee settled, the would-be replacement plaintiff—the police association—"has not proffered any other member" facing the same problem or "who was in that position previously, which implies that [the individual] was merely trapped in a sparsely populated limbo." *Id.* at 933. Thus, the company's "continuing policy" concerning terminations caused no "substantial adverse effect" to the association. *Id.* Likewise, here, neither the Union nor the Board has pointed to any other accident at the South Milwaukee facility before or in the last four years, much less any "continuing policy" against admitting Union officials. "Federal courts cannot produce advisory opinions on such issues." *Id.* (citations omitted); *see also Cent. Soya Co. v. Consol. Rail Corp.*, 614 F.2d 684, 689 (7th Cir. 1980).

Only where such unique events are, in fact, repeated is it "reasonably likely" that they will occur again. That was the situation in *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 892 (7th Cir. 1990), where "[t]he company reinstated [the member], then . . . fired him again, and an administrative law judge . . . found that it fired him for the same reason that caused the Board in its previous decision to find unfair labor practices." It was this kind of pattern that was lacking in *Milwaukee Police Association* and that is lacking here. According to the Union, this Court should "'decline to speculate that the likelihood of repeated conduct is so remote as to mandate disposition of the case on the ground of mootness.'" Union Br. 14 (quoting *NLRB v. Marland*

One-Way Clutch Co., 520 F.2d 856, 861 (7th Cir. 1975)). The speculation here is by the Union. The Court should vacate the Board's order.

C. Respondents distort the Board order's prospective and retrospective effect.

In addition to misconstruing the law of mootness and waiver, the Board refuses to defend the retrospective aspect of its order, which commands an "investigation" of an "accident" that occurred four years ago. Indeed, according to the Board, "[t]he case is not moot *as the Board requires enforcement of its Order that mandates not just access for the Union to investigate the 2011 accident*, but a health and safety inspection to ensure that the Company's crawler assembly production areas are free of hazards today." NLRB Br. 15 (emphasis added); *see also id.* at 37-38.

Yet, both the Board and the Union ultimately concede the order here is aimed at granting access purportedly to learn what caused the accident at the South Milwaukee plant. As the Union puts it, determining causation was the very "[p]urpose … of the requested on-site investigation." Union Br. 4. Nor could the Board and the Union dispute this; after all, they refused to accept the participation of local officials as a substitute for Ms. Thompson precisely because local officials allegedly could not possibly determine what went wrong here. As the Board complains in its opposition brief, "the Local 1343 officials do not have any expertise or training in the investigation or reconstruction of industrial accidents or fatalities." NLRB Br. 29. And ultimately, the Board and Union expressly concede that determining causation was the fundamental purpose of the Board's order:

- "[T]he Union is concerned with determining the ultimate cause of Smith's death." NLRB Br. 48.
- "[A]llowing the Union to investigate and potentially identify a cause would allow it to discuss with the Company ways to enhance the workplace." NLRB Br. 22.

- The Union seeks "on-site access to investigate the cause of the accident." Union Br. 25.

- "[A] conclusive finding on causation would have permitted the Union to enter into an intelligent dialogue with Caterpillar regarding ways to enhance workplace safety." Union Br. 25 (quoting ALJ order).

Yet, neither the Board nor the Union explains how that can be done by viewing a four-year-old accident scene. In a footnote, the Board asserts that "a site visit could lend important context, such as a better appreciation of size and scale, to the photographs, video, and documents provided." NLRB Br. 39, n.9. Likewise, the Union says that "even if the accident scene were cleaned up . . . [Ms. Thompson] could still . . . watch[] the operation . . . including . . . how the operation looks from different angles, the pressure of the assembly as it contacts the floor, watching different stages in the turning process, and how far under the crawler assembly a person needs to reach . . . to complete the operation." Union Br. 4.

But even if that were true, the operation today is different. Thus, there can be no "reasonable expectation" that a Union official, visiting today and viewing a different process, could improve the analysis of an accident that happened four years ago (*Raytheon Co.*, 398 U.S. at 27-28), which is why the Board itself denies mootness because "*the Board requires enforcement of its Order that mandates not just access for the Union to investigate the 2011* accident, but a[n] . . . inspection to ensure that the . . . areas are free of hazards today." NLRB Br. 15 (emphasis added). At a minimum, this case is moot as to the accident investigation; and this Court should so order.

Nor can the Board or the Union explain why the order is not moot as to its prospective application, as well. Whether the prospective relief is construed as "an opportunity to investigate the process," or as an order commanding a safety inspection at the plant after future accidents,

the Board's decision is not justiciable unless there is a "reasonable expectation" of future accidents. *Raytheon Co.*, 398 U.S. at 27-28.

Neither *ASARCO* nor *Hercules* is to the contrary, as neither case involved an order of a general safety inspection or a command to investigate future accidents, much less at one specific facility. Rather, both cases involved investigations of *past* accidents where (unlike here) the employer failed to offer adequate alternatives to access.

For example, unlike Caterpillar, which went to great lengths to compromise, "ASARCO gave no reason for its flat refusal to permit the Union's industrial hygienist into the mine, nor did it attempt to strike a mutually acceptable compromise[.]" *ASARCO, Inc., Tenn. Mines Div. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986). And ASARCO's safety director conceded that "without actually going into the mine one could not conduct a fair and complete investigation of the accident." *Id.* at 198. That did not happen here. Similarly, in *Hercules*, the union sought "to test for the presence of toxic or hazardous fumes," which required access "to determine whether samples were taken at times and places of likely exposure." *Hercules, Inc. v. NLRB*, 833 F.2d 426, 427, 429 (1987). By contrast, the videotaped reenactments here were witnessed by numerous local union officials and indisputably were taken at the accident site. Even as to retrospective access, then, the reasoning of *ASARCO* and *Hercules* does not apply.

It is no answer to say that this case is "capable of repetition but evading review." NLRB Br. 44. There is no "reasonable expectation" that there will be another accident at the South Milwaukee plant—much less one in which the accident scene will be materially changed before the arrival of an international union official. Nothing has happened at the plant in four years, and there is no reasonable expectation that the union's international safety representative will arrive too late to see the scene if some future accident ever occurs.

Finally, the Board insists, at a minimum, its order is not moot requiring Caterpillar to post notice of its alleged NLRA violation. NLRB Opp. 50; Union Opp. 50. But in neither of the Board's cases did the notice requirement stand alone. In *NLRB v. Methodist Hosp. of Gary, Inc.*, 733 F.2d 43, 48 (7th Cir. 1984), the notice requirement was accompanied by a command to keep a certain election policy in place; and *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002), involved an ongoing command that it "cease and desist its violations." Thus, the Board offers no authority for the proposition that a bare notice command (which is all that is left when the other moot portions of the order are stripped away) can render a moot case justiciable. The Court should vacate the order below in its entirety.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the Court should grant Caterpillar's petition for review and set aside the Board's decisions and orders.

Respectfully submitted,

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JULY 6, 2015

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Joseph J. Torres, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Office Word 2010 for Windows XP, this brief contains 6,984 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: July 6, 2015

/s/ Joseph J. Torres
Joseph J. Torres

CERTIFICATE OF SERVICE

I, Joseph J. Torres, certify that on July 6, 2015 I electronically filed the foregoing REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel of record:

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